MEDICAL JURISPRUDENCE†

HARTLEY F. PEART, ESQ.
San Francisco

Malpractice, Res Ipsa Loquitur

The case of *Ybarra vs. Spangard,* 25 A.C. 479, decided December 27, 1944, by the Supreme Court, involved an action for damages for personal injuries alleged to have been inflicted on plaintiff by the defendants during the course of a surgical operation.

The facts, in the words of the court, were:

"On October 28, 1939, plaintiff consulted defendant Dr. A, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. B at a hospital owned and managed by defendant Dr. C. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Doctors A and B and wheeled into the operating room by a nurse whom he believed to be defendant D, an employee of Dr. C. Defendant Dr. E, the anesthetist, also an employee of Dr. C, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. E then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant F, the special nurse, and another nurse who was not made a defendant.

"Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. A, who gave him diathermy treatments while he remained in the hospital. The pain did not cease, but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. A until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. B."

Plaintiff consulted two other physicians who apparently testified on the trial of the action to the effect that plaintiff suffered from an area of diminished sensation in the region of the shoulder and wasting away of the muscles.

The trial court granted a non-suit rendering judgment in favor of the defendants upon the theory that there was no showing which of the defendants were negligent, that the injury resulted from the act of any particular defendant or that the defendants had control of all of the instrumentalities which might have caused the injury.

The Supreme Court reversed this decision, holding that the familiar doctrine of *res ipsa loquitur* applied, the plaintiff thereby being relieved of the burden of proving how his injuries occurred or that they resulted from the negligence of any specific defendant.

The court stated that where the following three conditions were present, this doctrine requiring the defendants to explain the circumstances under which the injury occurred applies, that is, "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."

The court stated that in a modern hospital the patient was quite likely to come under the care of a number of persons and that from the very nature of things a patient could not know all that occurred while he was under the effects of an anesthetic. Here an injury had resulted to plaintiff which had no connection with the surgical operation for which he entered the hospital. The court concluded:

"We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from the syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.

LETTERS†

Concerning Proposed Letter on California Sickness Insurance Laws. From an Over-seas Military Colleague:

Northern France,
7 February, 1945.

Members of Medical and Nursing Professions, *Addressed.*
Dear Sirs:

It has come to the attention of this organization, ————, an affiliated medical unit, now participating in a major way in the support of one of our armies on a portion of the battlefield of France, that the California Legislature is at present in the process of legislating a fundamental change in the practice of medicine. Our being so far away and legally and honor-bound to our Government on a mission so vital, not alone to ourselves over here, but to everyone of you at home, makes our position helpless in personally conveying to you our impressions on a subject so filled with possibilities, both good and bad. Therefore we substitute this letter, our only means of conveying our sentiments, and trust you will vouchsafe it a hearing with the full and fair appre-

† CALIFORNIA AND WESTERN MEDICINE does not hold itself responsible for views expressed in articles or letters when signed by the author.

ciation that only an imperfect minimal discussion is, by this means, possible.

It seems superfluous to historically sketch the progress of medicine and surgery during the wartime and peacelife of America; even the advances in the interval from World War I and II are phenomenal . . . the salvage of war's casualties in the present inferno statistically show that. America, today, leads the world in medical science and it has come about through a form of government that has "given the horse the bit" and permitted that free and unrestricted rugged individualism so inherent, and necessary, in the nurse and doctor.

In the hospital evacuation organization with which the writer is connected, are those who were born and reared in the time of, and associated with, the pioneer doctor and are thoroughly conversant with his period; there are a number who have experienced contract practice with both large and small organizations; others in the general practice of medicine; a number with a restricted specialty, and for two and a half years we have experienced governmental medicine. A cross section of the past experiences of our personnel gives a knowledge of the public and personal efficiency under the several systems, for no matter what the change might be, if made, it is interrelated to one or other of the above classification.

To qualify as a physician requires ten years of arduous and intensive work, with a cost of between $10,000.00 to $15,000.00. Not uncommonly, more generally than imagined, a goodly part or all of this is owing, when the young doctor begins his career; and ultimately, finally, if successful, he looks forward to a probable maximum, under the present contemplated medical legislative changes, of $5,000.00 per annum. Such a system, be it State or Federal medicine, is not a procreator of *good* medicine, for obvious reasons:

It becomes a political football where "whom you know" replaces "what you know"; wherein, comparable to the farmer situation, the middle man "eats" up the percentage and ever and anon the "have nots" are after the "haves"; where the incomprehensible human-behaviored people—the belligerent, the queer, the "jittery," the excitable, the depressed, the emotional and all the other variations of the non-pathologic and pathologic states (one of our deep problems here); where those with anything from minor head colds to corns; those of the age when a two weeks' rest in the hospital is preferable and more invigorating than travel, plus its cost, et cetera, et cetera, will clamor for and demand and receive hospital care. To provide for this type, and the *really* sick, will call for millions to be expended for added hospital facilities. It is not the high cost of medicine, rather it is the high cost of hospitalization . . . unfortunately both are added together.

In the last war, Prohibition, with all its divergent ills, was idealistically brought forward. Now comes State Medicine; Federal Medicine really, for there is no doubt California is being used as a guinea pig. What then? It is the entering wedge to sweeping social and economic changes of State and National scope.

Some months ago a questionnaire was sent to each medical man in the Armed Forces. This questionnaire made no mention of State Medicine but the question was asked: "Would you be interested in some form of group practice?" Group practice to a medical man means something entirely different from State Medicine but we are informed that on the basis of the answer to this question it is claimed that 53 per cent of the medical men in the Armed Forces are in favor of State Medicine. We feel this is a deliberate misrepresentation of the facts. This issue should stand or fall on its merits. The very fact that political trickery of this kind is used to put their proposition over is good evidence that political trickery would be used in its administration if it were adopted.

We in the army are a part of our American government . . . and yet we are not; by necessity we are restricted through Army Regulations—we must, and again we say, by necessity, work as a unit. Individualism and individualistic thinking cannot be, irrespective of what the general public might think. Does California contemplate a continuance of this creed? If so, rugged individualism is deader than Dante's Inferno. If this is to be true we suggest the magnificent, trite and ostentatious dictum: "Give me men to match my mountains" be effaced from our California state building, for it would be out of place.

No part of any subject under discussion is unilateral. Medicine has its ills, both organically and individually. We have our weak links . . . but so does every other chain; so long as human nature is human that will be true. We are accused of supporting a Medical Trust. Nothing is further from the truth; the very individualism of its membership prevents such, but we can readily understand how through legislative submersion it might readily be coined. There are many, many members not in accord with either our state or national organization; in like manner there are many many workmen within the crafts not in accord with their leadership . . . such is Democracy.

We have tried, are continuing to try (with some success we feel) and will keep on trying to give the sick, no matter what their station in life or whether their purse is full or empty, that same good care. If there are "gaps" in the care of our citizenry, and we are told there are, and if there are certain groups wherein the cost of medicine (again we feel it to be the cost of hospitalization and not of medicine) is a hardship, it would not appear difficult to adjust such weaknesses by collaboration, one with the other.

The doctor does more than his share of charitable work and through the ages has shown his humanitarian instincts. To revolutionize medicine, is not, seemingly, a sane and sensible approach.

But if our legislative forum feels socialization of medicine, in the manner it is proposed to them, is correct —that that approach is sane, sensible and the only access to the proper protection of the health of our people they have an obligation superior to any appeal we might produce. However, if the procedure is the correct one for the one profession, why should it not be true for all?; the purport to the basic principle is the same. If we can be convinced the point is well taken then we are duty, and morally, bound to make the program a general one.

We are, Sir, in anticipation,

Very truly yours,

(SIGNATURE OF AN OVER-SEAS COLLEAGUE.)

San Francisco Hospital Policy

San Francisco's system of emergency hospitals will not be closed during this wartime period of a shortage in hospital beds, Chief Administrative Officer Thomas A. Brooks said recently.

He added further that he expects no recommendation to close them to come from two public health doctors now surveying the city's health department.

Dr. J. C. Geiger, city health director, said demands have been made upon him for an expansion of the emergency hospital system. Both the Richmond and Bayview districts seek such hospitals, he said.

The survey, expected to be completed in three weeks by Drs. Carl Buck and George Palmer, was undertaken to determine if the city is utilizing its public health facilities in the best manner. It was not intended as a criticism of Dr. Geiger, and is expected to praise his administration.—San Francisco *Examiner*.